

BEFORE THE

MAY 14 1993

Federal Communications CommissionFEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D. C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 92-195
Table of Allotments)	RM-7091
FM Broadcast Stations)	RM-7146
(Beverly Hills, Chiefland,)	RM-8123
Holiday, Micanopy and)	RM-8124
Sarasota, Florida))	

To: Chief, Allocations Branch

OPPOSITION TO PETITION FOR RECONSIDERATION

Pasco Pinellas Broadcasting Co. ("**Pasco**"), licensee of Station WLW-FM, Holiday, Florida, herein opposes the Petition for Reconsideration of Dickerson Broadcasting, Inc. ("**Dickerson**"), filed April 28, 1993. In opposition the following is stated:

A. Background

Through the Report and Order released March 29, 1993, in the above-captioned proceeding (DA 93-282), the Allocations Branch, inter alia, substituted Channel 246C2 for Channel 292A to Holiday, Florida,^{1/} and Channel 292C3 for Channel 246A to Beverly Hills, Florida. The Report and Order also modified the licenses of Stations WLW-FM and **WXOF(FM)** to specify operation on, respectively, the new Holiday and Beverly Hills allotments.

^{1/} In another proceeding, MM Docket No. 87-455, Channel 292C2 was substituted for Channel 292A and the license of Station WLW modified to specify operation on Channel 292C2. See, Memorandum Opinion and Order, 7 FCC Rcd 2557 (Deputy Chief, Policy and Rules Division 1992). An application for review of that. Memorandum Opinion and Order is pending.

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LIST A CODE

Dickerson objects to the allotment of Channel **292C3** to Beverly Hills.

For five and a half years, Pasco has been endeavoring to upgrade the Station WLW-FM allotment. Dickerson's Petition for Reconsideration is **Pasco's** latest obstacle. However, as demonstrated below, it is wholly without merit.

B. Dickerson's Petition

Three arguments can be distilled from Dickerson's petition:

1. Dickerson, licensee of Stations **WEAG (AM)** and WEAG-FM, Starke, Florida, complains that allotment of Channel **292C3** to Beverly Hills frustrates Dickerson's plans to change WEAG-FM's tower location and to increase that station's power to 6 kilowatts. Dickerson argues that allocation of Channel **292C3** to Beverly Hills changes "**the** conditions of [WEAG-FM's] licensing by modification without proper consideration of its licensees [sic] **views.**" Petition for Reconsideration at p. 4. Dickerson urges, inter alia, that Channel 292A be allotted to Beverly Hills instead of Channel **292C3**. Id. at pp. 6-8.

2. Dickerson further complains it was not "**served**, notified or otherwise informed of this proceeding" by the proponents or the Commission. Dickerson's president states he did not know about Docket No. 92-195 "**until** a benevolent station owner informed Dickerson on Friday afternoon, April 23, 1993." Id. at p. 4.

3. Finally, Dickerson argues the Allocations Branch erred in concluding that Section 73.213(c)(1) was applicable to the Beverly Hills channel substitution. Id.

C. Pasco's Response

Dickerson's petition is not well founded. Its arguments are addressed in the order set forth above.

1. First, Dickerson's claim that the Beverly Hills allotment constitutes a modification of WEAG-FM's license is completely without any merit. WEAG-FM has never been licensed to operate at 6 kilowatts. Nothing in the Commission's rules guarantees that every Class A station will be permitted to operate with 6 kilowatts ERP. Each Class A station is subject to the restrictions the Commission has adopted, including that Section 73.213(c)(1) of the Rules will be applicable to rule making petitions filed prior to October 2, 1989. Second Report and Order in MM Docket No. 88-375, 4 FCC Rcd 6375, 5382 (1989).

2. Dickerson had ample opportunity to present its arguments as to why allotment of Channel 292A to Beverly Hills, rather than 292C3, would better serve the public interest. The fact it failed to do so in a timely manner cannot be blamed on the Commission or the participants in this proceeding. The pertinent facts are these:

A. In response to a petition filed September 29, 1989, by Heart of Citrus, Inc. ("Citrus"), permittee of WXOF(FM), the commission issued a rulemaking notice

proposing substitution of Channel **246C3** for Channel 246A at Beverly Hills. Notice of Proposed Rule Making in MM Docket No. 92-195, 7 FCC Rcd 5910 (Chief, Allocations Branch 1992).

- B. On October 30, 1992, Sarasota-FM, Inc. ("SF,"), licensee of Station WSRZ(FM), Sarasota, Florida, and Gator Broadcasting Corporation ("Gator"), licensee of Station WRRX(FM), Micanopy, Florida, submitted comments and a counterproposal. **SFI** and Gator proposed, inter alia, substitution of Channel **292C3** for Channel 246A at Beverly Hills and the corresponding modification of the WXOF license. Significantly, **SFI** and Gator also submitted an alternative allotment scheme under which Channel 292A would be substituted for Channel **246A** at Beverly Hills.^{2/}
- C. On November 20, 1992, the Commission issued a Public Notice which summarized the **SFI** and Gator counterproposals, including the allotment of Channel **293C3** to Beverly Hills. See Attachment A hereto. That Public Notice specified that reply comments were due 15 days after release of the Public Notice. (Because the 15th day after the

^{2/} Thus, the allotment alternative Dickerson champions most vigorously in its petition had indeed been presented to the Allocations Branch before the subject Report and Order was issued.

Public Notice fell on a weekend, the actual deadline was December 7, 1992.)

- D. On that deadline, Pasco, Citrus and **SFI/Gator** filed reply comments. Dickerson did not.

In light of these circumstances, no justification exists for now considering Dickerson's arguments regarding his allotment proposals. To the extent that Dickerson's petition attempts to rely on facts which purportedly have not been presented to the Commission previously, consideration is warranted only if:

- (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;
- (2) The facts relied on were unknown to the petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
- (3) The Commission determines that consideration of the facts relied on is required in the public interest.

47 C.F.R. §1.429(b)(1)-(3).

Here, as noted above, December 7, 1992 was the last opportunity for Dickerson to present facts and argument with respect to the proposed allotment of Channel **292C3** to Beverly Hills. Since then no pertinent events have occurred, nor circumstances changed. Dickerson through the exercise of ordinary diligence obviously could have learned of the proposed allotment of Channel **292C3** to Beverly Hills prior the December 7 reply comment deadline.

Furthermore, in light of the fact **SFI** and Gator previously presented the alternative of allotting Channel 292A to Beverly Hills, the public interest does not require rehashing the matter at this late date.

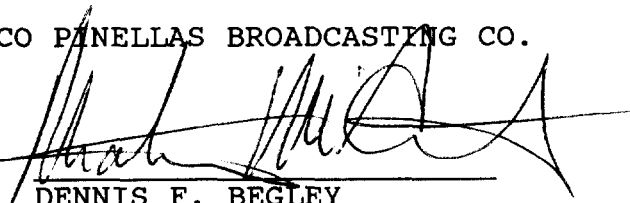
3. Dickerson argues that because Citrus' original rulemaking petition, filed September 29, 1989, proposed allotment of Channel **246C3**, rather than Channel **292C3**, at Beverly Hills, Section 73.213(c)(1) is inapplicable (or to use Dickerson's phrase, "purely a pipe dream"). The Commission, however, has made clear that any rulemaking petition filed prior to October 2, 1989, is to be considered under the old mileage separation rules (i.e., Section 73.213(c)(1)). See Second Report and Order in MM Docket No. 88-375, 4 FCC **Rcd** at 6382. The fact that Citrus' petition specified another specific channel is immaterial. The Commission long has had the latitude, in responding to a rulemaking petition, to allot a frequency different from that specifically requested by the petitioner. E.g., Pinewood, South Carolina, 5 FCC **Rcd** 7609 (1990); Medford and Grants Pass, Oregon, 45 RR 2d 359 (1979). Indeed, the Notice of Proposed Rule Making issued in response to Citrus' petition expressly stated "the filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved." 7 FCC **Rcd** at 5911 (paragraph 3(c) of Appendix). Under the circumstances, there is no legal or equitable reason Citrus should not be entitled to avail itself of

the provisions of Section 73.213(c)(1) with respect to Station WEAG-FM.

In conclusion, no justification exists for further delaying this proceeding in order to consider Dickerson's erroneous arguments. Dickerson's petition for reconsideration promptly should be DENIED.

PASCO PINELLAS BROADCASTING CO.

By:


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Its Counsel

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May 17, 1993

ATTACHMENT A

PUBLIC NOTICE OF
COUNTER PROPOSAL OF
SARASOTA - FM, INC.
and
GATOR BROADCASTING CORPORATION
in
MM DOCKET NO. 92-195



PUBLIC NOTICE

Federal Communicatio

RM No.	Rule Sec.	Petitioner	Date Rec'd.	Nature of Petition
8123*	73.202(b)	Heart of Citrus, Inc. (Filed by A. Wray Fitch III Gammon & Grange 8280 Greensboro Drive Seventh Floor McLean, VA 22102)	10-30-92	Request Amendment FM Table of Allotments to substitute Ch. 246C2 for Ch. 246A at Beverly Hills, Florida and modify the construction permit of Station WXOF to specify operation on Ch. 246C2 at coordinates 28-46-42; 82-28-31.
8124"	73.202(b)	Sarasota-FM, Inc. and (Filed by David G. O'Neil Michael H. Bader Haley, Bader & Potts 4350 North Fairfax Drive Suite 900 Arlington, VA 22203-1633) and Gator Broadcasting Corporation (Filed by David D. Oxenford, Jr. Fisher, Wayland, Cooper & Leader 1255 23rd Street, N.W. Suite 800 Washington, D.C. 20037)	10-30-92	Request Amendment FM Table of Allotments to substitute Ch. 247C2 for Ch. 249A at Micanopy, Florida and modify the license of Station WRRX-FM to specify operation on Ch. 247C2 at coordinates 29-38-55; 82-25-30; substitute Ch. 293C2 for Ch. 292A at Sarasota, Florida and modify the license of Station WSRZ-FM to specify operation on Ch. 293C2 at coordinates 27-27-49; 82-40-01; substitute Ch. 246C2 for Ch. 292A at Holiday Florida and modify the license of Station WLWU-FM to specify operation on Ch. 246C2 at coordinates 28-16-51; 82-42-52; substitute Ch. 292C3 for Ch. 246A at Beverly Hills, Florida and modify the construction permit of Station WXOF to specify operation on Ch. 292C3 at coordinates 28-44-09; 82-29-56; substitute Ch. 300A for Ch. 247A at Chiefland, Florida and modify the construction permit of Station WLQH to specify operation on Ch. 300A at coordinates 29-31-00; 82-53-11.

*THE ABOVE PETITIONS FOR RULEMAKING WILL BE TREATED AS COUNTERPROPOSALS IN ~~AM~~ DOCKET NO. 92-195. REPLY COMMENTS TO THESE COUNTERPROPOSALS SHOULD BE SUBMITTED IN THIS DOCKET NO. LATER THAN 15 DAYS (RATHER THAN WITHIN 30 DAYS) AFTER THE DATE OF THIS PUBLIC NOTICE.

CERTIFICATE OF SERVICE

I, Jean S. Henderson, hereby certify that on this 17th day of **May**, 1993, copies of the foregoing **OPPOSITION TO PETITION FOR RECONSIDERATION** were hand delivered or mailed, first class, postage prepaid, to the following:

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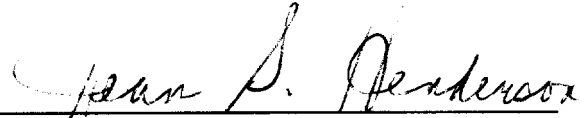
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